IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1849

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

—against—

GERALD L. SHARGEL,
Attorney in Behalf of VINCENT ALOI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent Gerald L. Shargel, attorney in behalf of Vincent Aloi, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 596 F.2d 42.

Question Presented

Where a criminal defendant is tried on an allegation that he testified falsely under a grant of immunity, is it constitutionally permissible to introduce truthful immunized testimony that is completely unrelated to the corpus delicti of the perjury charge?

Statement of Facts

Petitioner's statement of the facts (pp. 4-11) fails, with due respect, to supply this court with a clear description of what occurred during Aloi's appearance before the New York County Grand Jury on November 28, 1972. In order to sharpen the focus on these facts, facts which are critical to the issue raised, Respondent submits the following.

The issue framed in this petition was born from the introduction at trial of People's Exhibit 10, which consisted of 86 transcript pages—virtually the entire appearance—of Aloi's immunized testimony before the Grand Jury. (A 37-38)* The defense position at trial, as it was in the New York Appellate Courts and in the Federal habeas proceeding, was that since the testimony was immunized, the only admissible portion was that which related to the corpus delicti of the alleged perjury. (A 38-39) Except for a particular deletion regarding other subpoenas to which he was then subject, the entire testimony was read to the petit jury limited only by the Court's instruction that the majority of it was relevant solely to the issue of materiality. (A 50-53) As analyzed in the District Court opinion by Judge Goettel:

> "The minutes of petitioner's testimony before the grand jury constitute 90 pages of the trial record. Of that material, 59 pages, or nearly two-thirds of the minutes, relate to matters which appear altogether immaterial both to the alleged perjurious statement and to the developing the context in which the perjured testimony was given. Questions and answers concerning the nature of Aloi's business, how the business was run,

* The letter "A" refers to Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

> where it was located, the dates during which Aloi worked, and the extent of income derived from it, formed the substance of this material (trial transcript pp 378-437). An additional 18 pages of testimony concerned matters only somewhat relevant to developing the context of the perjury, which at the same time are, however, quite incriminating in regards to Petitioner's organized crime connections. Question[s] and answers here concerned the nature of Petitioner's relationship with such individuals as Messrs. DiBiasi, Luperelli and Yacavelli [sic] and included such questions as (transcript at 447) 'Do you know his nickname?' (Transcript at 437-455). Only nine pages of the minutes contained questioning which is directly relevant to the issue of Petitioner's presence in the Nyack apartment. (Transcript at 456-464)."

Although the Petitioner describes Aloi's appearance before the grand jury as "brief", further analysis reveals the following: while testifying under a grant of immunity, Aloi was asked and answered more than 500 questions before the grand jury.* Although the alleged act of perjury related to Petitioner's singular assertion that he had never been to apartment LK at 101 Gedney Street, Nyack, New York, this topic, viewed liberally, was covered in some 57 questions and answers before the grand jury. The prosecutor's tireless framing and reframing of substantially the same question was met with Petitioner's equally tireless denials with substantially the same answer. (A 124, 133-39, 141 et seq.) If the petit jury were to believe

* The numbers set forth are not intended to be precise. Precision has been made difficult, if not unobtainable, by the repetitious manner in which the questions were posed. Nevertheless, these comparisons are useful in gauging the content and probative relevance of Petitioner's testimony before the grand jury.

the People's witnesses, these 57 questions clearly established the corpus delicti of the crime and would, therefore, have completed the People's prima facie case. These questions, of course, did not bear on the issue of materiality but, rather, went to the issue of Petitioner's alleged false testimony.

On the question of materiality, pursuant to instructions of the trial court, the jury was allowed to consider some 502 additional questions and answers. The relevance of this other testimony to the question of materiality or "context" ranged from somewhat relevant to completely irrelevant. Interestingly, of these 502 other questions and answers, 335 related to Aloi's employment and business interests which had no conceivable relevance to the inquiry of the grand jury before which he appeared. The remaining questions and answers before the grand jury related either to the general topic of the Gallo murder or Aloi's acquaintance with alleged co-conspirators DiBiasi, Yacavelli and Phillip Gambino. (A 60-67, 107, 116-124, 133, 138-141) Aloi's contention in the courts below was that the introduction of the more than 300 questions and answers relating to other than the corpus delicti of the perjury was constitutional error.

Reasons Why the Writ Should Be Denied

Petitioner maintains that "this case presents important issues concerning what the Fifth Amendment requires in the conduct of perjury trials when the perjury is charged to have been committed by a grand jury witness while testifying under a grant of immunity." Respondent respectfully contends that no such "important issues" are raised by this petition since the constitutional principles on which the Circuit Court affirmed the District Court's issuance of the writ have been clearly established since

this court decided, some 65 years ago, *Cameron* v. *United States,* 231 U.S. 710 (1914).

The State's argument in the Circuit Court of Appeals was that the District Court "ignored" the *Cameron* decision and erroneously relied on the Third Circuit's decisions in *United States* v. *Hockenberry,* 474 F.2d 247 (3d Cir. 1973) and *United States* v. *Apfelbaum,* 584 F.2d 1264 (3d Cir. 1978) *cert. granted* 99 S.Ct. 1496 (1979). The Circuit Court, however, without deciding whether to adopt the *Apfelbaum* rule found that under *Cameron,* the very case on which Petitioner relied, admission of Aloi's entire appearance before the grand jury was constitutionally improper.

> "We find it unnecessary to decide in this case whether the *Afpelbaum* or some more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, *even under the more liberal Cameron standard,* it was clearly improper to admit virtually all of his immunized grand jury testimony. Since it was not shown that all of his testimony was false, the testimony could not have been admitted as unprotected by the grant of immunity. Assuming at least some of it was truthful, it had no probative value in determining whether the alleged perjurious portion was intentionally false." 596 F.2d at p. 44

Thus, the fact that this court will, in its next term, review the *Afpelbaum* case does not support a finding that this case is appropriate for review as well. In short, *Afpelbaum* arguably went beyond *Cameron.* This case did not.

In *Cameron* this court held that immunized testimony could be used for any "legitimate purpose" in establishing

the perjury charge. But the "use" of this testimony, beyond establishing the perjury was improper.

> "The subsequent prosecution of *Cameron* for perjury in the two bankruptcy proceedings was a criminal proceeding in a court of the United States, and testimony given in the one bankruptcy proceeding, *not tending to establish perjury in that proceeding,* should not have been received to establish perjury charged in the other proceeding." 34 S.Ct. at 248 (emphasis supplied).

In this case Aloi's testimony on the subject of his employment and business interests had no "legitimate purpose" relative to establishing the perjury charge concerning the Nyack visit.

In *Afpelbaum* truthful immunized testimony, *relevant* to the prosecution's case, was held inadmissible since it went beyond the corpus delicti of the perjury charge. The *Afpelbaum* rule therefore is far more stringent than the "rule" interpreted from the broader language found in *Cameron.* The point to be made here is that the instant case does not contain an *"Afpelbaum"* issue.

Nor does this case, as Petitioner suggests, present any issue whatsoever concerning the scope of federal habeas corpus review of evidentiary rulings in state perjury prosecutions. (Petition p. 14) The Court of Appeals decision in this case does not represent federal review of a state court evidentiary ruling. Rather, it is a constitutional ruling which is involved. Where as here, the questioned evidence is patently irrelevant to the perjury charge it is constitutional, not evidentiary error which flows from the admission of the testimony.

Finally, only brief mention need be made of the state's effort to rely on the "solicitor general's position" in *Dunn*

v. *United States,* —— U.S. —— (June 4, 1979) in order to obtain a writ of certiorari in this case. Undaunted by the fact that *Dunn* is not on point, petitioner nevertheless urges an "approach" which makes no sense in the context of this case and the theory of which has been rejected by this court in *Cameron.* Petitioner argues that a witness has no Fifth Amendment privilege and no right to remain silent on the ground that he is about to perjure himself. Thus, Petitioner argues, the witness' immunized testimony may be used to prove that he committed perjury in the same proceeding in which that testimony was given. It is of course concededly true that if Petitioner did not have a legitimate Fifth Amendment claim, the immunity supplied would not afford protection that the Fifth Amendment itself would not supply. There was however in this case no suggestion, nor could there be, that Aloi did not have a legitimate Fifth Amendment claim. If Petitioner's "approach" were accepted under the facts of this case, Aloi would not be left in the same position as if he had succeeded in remaining silent by virtue of his Fifth Amendment privilege. Thus, no longer would the witness and the Government be left "in substantially the same position as if the witness had claimed his privilege." *Kastigar* v. *United States,* 406 U.S. 441, 458-59 (1972). Despite Petitioner's assertion (page 13) there is no issue in this case about "whether a witness should be permitted to invoke the privilege against self-incrimination and remain silent on the ground that he is about to perjure himself."

With a view toward this court's decision in *Cameron* v. *United States,* this case involves nothing other than a clear cut violation of respondent's Fifth Amendment rights by the introduction of truthful immunized testimony which had no conceivable relevance to the perjury charge on which respondent was convicted. The careful opinion of the

District Court and the *per curiam* affirmance by the Court of Appeals demonstrate conclusively that there is no uncertainty about the issues raised by this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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